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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HOLLY SPRINGS, LTD., Plaintiff and Respondent, v. BENTLEY EQUITY, LLC, et al. Defendants and Appellants.	D059265 (Super. Ct. No. 37-2010-00087790-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

Holly Springs, Ltd. and Bentley Equity, LLC, Bentley Investments L.P., and Bentley Equity, Inc. (collectively Bentley) entered into a written contract whereby Bentley had the option to purchase certain undeveloped real property owned by Holly Springs. After the parties disagreed whether Bentley had exercised the option prior to it expiring, Holly Springs filed a declaratory relief action to determine the parties' respective rights under the contract.

The court granted Holly Springs's motion for summary judgment, effectively extinguishing any interest or right Bentley had to exercise the option. In its ruling, the court interpreted the contract as requiring Bentley to exercise the option by a specific method. Because there was no evidence that Bentley did so, the court ruled summary judgment was warranted. Bentley appeals, contending the contract was ambiguous and the court's interpretation incorrect. It also argues triable issues of material fact exist as to whether it exercised the option, the existence of an oral modification of the contract, and whether Holly Springs waived certain provisions of the contract. In addition, Bentley asserts the court abused its discretion in sustaining Holly Springs's evidentiary objections to some of the evidence Bentley filed in opposition to the motion for summary judgment.

Because we determine the contract did not require a specific method for exercising the option, we conclude triable issues of fact exist as to whether Bentley exercised the option, and if he did not, if Holly Springs waived the option deadline of the contract. Therefore, we reverse.

FACTS AND PROCEDURAL BACKGROUND

On August 31, 1999, Holly Springs and Bentley entered into a written contract entitled "Option Agreement and Escrow Instructions" (the Agreement). At the time the Agreement was negotiated and executed, Holly Springs was a family-based limited partnership, managed by Lucia Sippel (Sippel). David Bentley (David) owned and managed Bentley.

Holly Springs owned farm and ranch land in Carlsbad that it wanted to develop into a subdivision for single family housing. Bentley was involved in developing a

contiguous housing subdivision called Cantarini Ranch. Entitlement for both subdivisions required the inclusion of multifamily housing to satisfy Carlsbad's affordable housing requirements. The Agreement's purpose was to establish and entitle a piece of the Holly Springs owned property to be used to meet the multifamily housing needs for the development of two subdivisions (the Option Property).

Under the Agreement, Bentley agreed to provide the capital and real estate expertise to secure the appropriate land entitlements from Carlsbad for the Option Property. For Bentley's effort and investment, Holly Springs granted it an option to purchase the Option Property. If Bentley did not exercise the option, all costs paid in securing the appropriate land entitlements would be retained by Holly Springs as consideration for the granting of the option. The purchase price for the Option Property was not defined in the Agreement, but instead, would be set as of "the date of [Bentley's] election to purchase."

The disagreement between the parties giving rise to Holly Springs's lawsuit involves paragraph 9 the Agreement. Paragraph 9 states:

> "The Option may be exercised by Optionee delivering to First American Title Insurance Company, or other mutually agreeable title company doing business in San Diego County ('Escrow Holder'), prior to the expiration of the Option Term, an executed original or copy of this Agreement. Optionee shall close the escrow for the purchase of the [Option] Property on the later of (i) sixty (60) days after the [Option] Property is established as a separate legal parcel, or (b) sixty (60) days after the date that the [Option] Property's fair value is established pursuant to Section 8 above."

The parties amended the Agreement three times. These amendments, among other things, changed the optionee to Bentley Investments, L.P. The third amendment set forth

two different option term scenarios that impacted the timing of the valuation of the Option Property. The first alternative was for the option term to expire 60 days after Carlsbad approved the Option Property for "for-sale" units. The second scenario extended the option term expiration date to June 30, 2007. The parties agree that the first alternative did not occur, and thus, June 30, 2007 was the option term expiration date.

On May 17, 2007, David spoke with Sippel to explore Holly Springs's interest in pursuing a fourth extension of the option term. At that time, David advised Sippel that funding was available for the purchase of the Option Property. Sippel told David that Holly Springs wanted to proceed with the sale of the Option Property to Bentley. On May 17, 2007, David Bentley communicated Bentley's election to exercise the option as of June 30, 2007.

On May 30, 2007, David again reaffirmed Bentley's desire to exercise the Option. Sippel asked David to consult with her son, Doug Sippel (Doug), a financial planner, about the structure of the transaction because he was handling the tax and estate planning issues for the family. Sippel asked David to travel to Oregon to meet with Doug before moving forward with the purchase.

On June 29, 2007, David traveled to Portland, Oregon to meet with Doug and discuss the purchase of the Option Property. During the meeting, David and Doug agreed that Bentley would obtain a third party appraisal of the Option Property and prepare the transaction documents.

On July 6, 2007, after returning to San Diego, David confirmed the events of the meeting and Bentley's intent to exercise the option in an email to Doug and Sippel. In the

email, David stated, "In order to execute my option on the [Option] [P]roperty, I have initiated the valuation process. . . . [¶] . . . . [¶] In any event, I understand you are working closely with legal and tax counsel to ensure the most advantageous asset management structure. To that end, Marc and I will remain focused for now on generating the valuation and transaction documents while keeping the final engineering process on track. We'll address the transaction structure and estate planning issues with you as they arise."

On or about July 10, 2007, David Bentley talked to Sippel regarding the progress of Bentley's purchase of the Option Property and reaffirmed that the details of the transaction would be agreed on and approved by Doug before escrow was opened. On July 21, 2007, Doug called David and told him that Sippel had been diagnosed with pancreatic cancer. He requested a postponement of the Option Property purchase to allow Sippel and the family time to focus on Sippel's health. In response, David offered to do whatever the family wanted to do, including forbearance of the purchase of the Option Property and an extension of the option term to meet their needs.

Sippel died on September 9, 2007. On September 12, 2007, David called Doug to offer his condolences. Doug expressed concern about the tax and estate implications of Sippel's death. In response, David again agreed to accommodate the needs of Sippel's family. At that time, Doug asked for a copy of the appraisal of the Option Property. The next day, David sent the appraisal and an evaluation of the proposed sales price to Doug.

On October 31, 2007, Holly Springs's attorney called David and told him that the Option Property purchase was being delayed by Sippel's death and the family's need to

clarify partnership, tax, and estate issues. On November 8, 2007, Doug advised David that Holly Springs was still deciding what to do about the tax and estate issues arising out of the potential Option Property purchase following Sippel's death. The two men discussed the possibility of extending the option term.

On November 29, 2007, Doug Sippel called David and told him that Holly Springs "need[ed] cash" and was ready to complete the Option Property sale subject to its review of the appraisal and invoices with the partners. On December 17, 2007, Bentley was advised that Holly Springs's partners would be meeting over the Christmas holiday to discuss the Option Property sale. On January 14, 2008, David called Doug to find out the status of the sale and was told that the family needed more time and that they were meeting in February to discuss the sale.

On March 10, 2008, David met with Doug and Susan Kelly (Kelly), Holly Springs's new management. At this meeting, Doug and Kelly introduced a new consultant for the development of the Option Property and criticized David's efforts. They also told David that Holly Springs intended to make significant changes and wanted to retain ownership of the Option Property to develop the multifamily affordable housing project itself.

Between August 1999 and May 2007, Bentley contributed over $525,000 of capital investment toward the development of the Option Property as well as thousands of hours of uncompensated management and unreimbursed overhead. Bentley's efforts and capital contribution transformed the raw unentitled Option Property with a value of $20,000 per acre, to a fully designed and entitled residential mixed use subdivision

project, approved for 122 units, with an estimated "as is" land value of more than $100,000 per acre.

On March 16, 2010, Holly Springs filed a complaint for declaratory relief against Bentley. By way of the lawsuit, Holly Springs sought a declaration from the court that: (1) the time for Bentley to exercise its option to purchase the Option Property had expired under the Agreement; (2) Bentley had not exercised its option prior to the expiration of the option term; (3) Bentley had no right, title, or interest in the Option Property and no longer had any right to purchase it; and (4) Bentley's option was no longer an encumbrance on the Option Property.

Bentley answered the complaint, and Holly Springs filed a motion for summary judgment. Bentley filed an opposition, to which Holly Springs replied. Interpreting paragraph 9 of the Agreement as establishing the only way for Bentley to exercise its option to purchase the Option Property, the court granted the motion, finding Bentley did not exercise the option prior to the expiration of the option term.

The court entered judgment, and Bentley timely appealed.

DISCUSSION

I

SUMMARY JUDGMENT

A. Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained." (*Guz v. Bechtel*

National, Inc. (2000) 24 Cal.4th 317, 334.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the "moving party is entitled to a judgment as a matter of law" (Code Civ. Proc., § 437c, subd. (c)), the court must grant the motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

Code of Civil Procedure section 437c, subdivision (p)(1), states:

> "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

Summary judgment law in California "no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action." (*Aguilar, supra,* 25 Cal.4th at p. 853.) It is sufficient for a plaintiff to prove each element of the cause of action. (*Ibid.*)

"To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case, . . . the 'court should grant'

the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device." (*Aguilar*, *supra*, 25 Cal.4th at p. 855.)

On appellate review of an order granting or denying a motion for summary judgment, "we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] 'The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation.] Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations.]" (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

B. The Superior Court's Ruling

Holly Springs offered nine undisputed material facts in support of its motion for summary judgment, two of which are critical for our review. The first is that Bentley did not deliver an executed original or copy of the Agreement to First American Title Company or any other title company by June 30, 2007, or any time thereafter. Bentley does not dispute this fact. However, this fact only becomes material if the Agreement requires Bentley to exercise the option per the procedure set out in paragraph 9.

The second essential, undisputed fact is that Holly Springs did not agree to extend the deadline for exercising the option beyond the date set forth in the third amendment to the Agreement. Bentley disputed this fact.

The court found the Agreement was unambiguous and required Bentley to exercise the option in the manner specified in paragraph 9 of the Agreement. Because there was no evidence that Bentley exercised the option in the manner the court believed the Agreement required, it ruled summary judgment was appropriate. In addition, it ruled Bentley had not submitted sufficient evidence to create a triable issue of fact as to any of its equitable defenses.

C. Evidentiary Rulings

In opposing summary judgment, Bentley objected to evidence offered by Holly Springs. The court sustained all these objections except one.

Holly Springs objected to most of the evidence submitted by Bentley. The court overruled all but four of these objections.

To the extent the parties do not challenge the court's rulings on the objections to the evidence presented in support of and in opposition to the motion for summary judgment, we consider the evidence properly admitted or excluded as decided by the court. (See *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 [failure to challenge trial court's evidentiary rulings waives claim of evidentiary error on appeal].) Here, Bentley only challenges the court's evidentiary rulings sustaining four of Holly Springs's objections. As to these challenges, "the weight of authority holds that" we review "a court's final rulings on evidentiary objections by applying an abuse of discretion standard." (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Bentley's evidence in opposition to Holly Springs's motion for summary judgment consisted almost entirely of David Bentley's declaration. In paragraph 9 of David's

declaration, David stated that he and Sippel, as the negotiators of the Agreement, used the word "may" in paragraph 9 to provide the parties with some flexibility as to if and when the option may be exercised. Holly Springs objected to the entire paragraph 9 of David's declaration on the grounds that the Agreement was the best evidence for its contents and speaks for itself; David's characterizations, conclusions, and opinions concerning the Agreement were irrelevant; and David's statement regarding his and Sippel's intentions was improper lay opinion testimony and lacked foundation. The court sustained the objection, but only as to evidence of Sippel's intent.

Bentley argues the ruling was in error because paragraph 9 of David's declaration is based on conversations with David and Sippel during the negotiation of the Agreement. "Generally, a lay witness may not give an opinion about another's state of mind," but "a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397; see also Evid. Code, § 800.) Here, although Bentley argues David was basing paragraph 9 of his declaration on his conversations with Sippel, the declaration does not lay enough foundation to establish this fact nor does it explain what part of Sippel's behavior during their conversations led David to his belief as to Sippel's intent. Thus, we conclude the court did not abuse its discretion in sustaining Holly Springs's objection to paragraph 9 of David's declaration.

Similarly, we cannot find fault with the court's ruling sustaining Holly Springs's objections to paragraphs 17 and 20 of David's declaration. Again, Bentley attempts to establish Sippel's mental state without sufficient foundation to support his opinion.

Finally, Bentley takes issue with the court excluding portions of David's declaration discussing the content of a March 28, 2008 letter from Holly Springs to Bentley as hearsay. We conclude the court did not abuse its discretion. "Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." (Evid. Code, § 1523, subd. (a).) Bentley does not argue that, in this case, any statute provides an exception to this general rule of inadmissibility. Instead, it asserts the court abused its discretion by failing to consider the March 28, 2008 letter when it was offered at the summary judgment hearing. However, a court is well within its discretion not to consider any new evidence offered at a summary judgment hearing. (See *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1190.)

In short, the court did not abuse its discretion in sustaining four of Holly Springs's objections to Bentley's evidence. Thus, as part of our review, we will consider only the evidence admitted by the superior court. (See *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

II

THE INTERPRETATION OF THE AGREEMENT

A. The Dispute

The crux of the superior court's ruling granting summary judgment rests on its interpretation of the Agreement, specifically paragraph 9. Holly Springs contends the word "may" in paragraph 9 reinforces Bentley's option to purchase the Option Property. In other words, it may exercise the option, but does not have to do so. Holly Springs further asserts while the obligation to exercise the option is discretionary, the method of

exercising it is mandatory. Thus, according to Holly Springs, the only way the Agreement permits Bentley to exercise the option is set forth in paragraph 9. To the contrary, Bentley argues the use of the word "may" in paragraph 9 renders the method of exercising the option in that paragraph permissive. Bentley therefore asserts paragraph 9 does not limit how he could exercise the option.

The superior court ruled that paragraph 9 was unambiguous and the method of exercising the option set forth in that paragraph was "the only method for exercising the option." The court found, after considering extrinsic evidence offered by Bentley, that paragraph 9 was not reasonably susceptible to the interpretation urged by Bentley. We disagree with the superior court. The Agreement, specifically paragraph 9, is ambiguous.

B. Whether the Agreement is Ambiguous

"Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning." (*Morey v. Vannuci* (1998) 64 Cal.App.4th 904, 912 (*Morey*).) Here, the court appropriately considered the extrinsic evidence offered by Bentley, but found the language of paragraph 9 was not reasonably susceptible to Bentley's urged interpretation.

"The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not fact." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) Thus, we independently review the court's determination of the Agreement's ambiguity.

Here, the two competing interpretations of paragraph 9 involve the meaning of the word "may" in the first sentence: "The Option may be exercised by Optionee delivering to First American Title Insurance Company . . . prior to the expiration of the Option Term, an executed original or copy of this Agreement." Bentley maintains the use of the word "may" renders paragraph 9 permissive. Thus, accordingly to Bentley, paragraph 9 merely provides one manner in which the option could be executed. The court, however, agreed with Holly Springs and found this language unambiguous and that it was not "reasonably susceptible" to Bentley's urged interpretation.

"Generally speaking, 'the word "may" is permissive--you can do it if you want, but you aren't being forced to--while the word "shall" is mandatory--no way you can do it. (See, e.g., *Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433 . . . ["Ordinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty."]; *Decker v. U.D. Registry, Inc*. (2003) 105 Cal.App.4th 1382, 1389[1] . . . [generally explaining that may is discretionary, shall is mandatory]; see also *Dean v. Kuchel* (1951) 37 Cal.2d 97, 101-102 . . . ["The word 'may' is at least reasonably susceptible of a permissive meaning rather than mandatory or prohibitory. . . ."].)' [Citation.]" (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 208.) Further, we are mindful that "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless

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1 Superseded by statute on other grounds as stated in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1349.

used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.)

Considering the usual permissive connotation elicited by the use of the word "may," paragraph 9 appears to be "reasonably susceptible" to Bentley's interpretation: Bentley was not required to exercise the option by depositing the signed Agreement with the title company, but could do so. In addition, Bentley's interpretation of paragraph 9 is bolstered by extrinsic evidence. Bentley offered evidence that, at the time of negotiating the Agreement, there existed uncertainties in the entitlement process, the real estate market, and the potential business or personal needs of the parties. Thus, the use of the word "may" in paragraph 9 underscored the parties' desire to be flexible in how the option was to be exercised.

We therefore conclude paragraph 9 is "reasonably susceptible" to Bentley's urged interpretation: it provides a permissive procedure for exercising the option, but not the only one.

C. Paragraph 9

Having determined the language of paragraph 9 is "reasonably susceptible" to Bentley's interpretation, we now move to the task of interpreting the Agreement. (See *Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1165.) To do so, we must determine: "[W]hat did the parties intend the language to mean?" (*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448.)

Although Bentley offered parol evidence to aid in the interpretation, Holly Springs did not. Thus, when, as here, parol evidence is not conflicting, construction of the

contract is a question of law, and we will independently construe the writing. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

The primary goal of contract interpretation is to give effect to the mutual intent at the time of contracting. (Civ. Code, § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Morey*, supra, 64 Cal.App.4th at p. 912.)

1. The Language Used in the Agreement

As we determine above, the language of paragraph 9 is "reasonably susceptible" to Bentley's asserted interpretation of it. Put differently, paragraph 9 is ambiguous and provides one procedure for exercising the option, but not the only one. Holly Springs argues such an interpretation of paragraph 9 results in that paragraph serving "no functional purpose." Holly Springs thus asserts that "may" in paragraph 9 only refers to "the very nature of an option." In other words, "may" just connotes that Bentley can, but does not have to exercise the option. It does not modify how the option was to be exercised, which, according to Holly Springs, is clearly explained in the rest of paragraph 9.

Under Holly Springs's desired interpretation, paragraph 9 is meant to address what must occur when a certain nonmandatory condition precedent is satisfied. To this end,

Bentley may exercise the option, but once it decides to do so (the condition precedent), it has to deposit a copy of the executed Agreement with the title company as detailed in the rest of the paragraph.

It is appropriate to begin our inquiry with a review of the literal terminology of the Agreement. (Civ. Code, §§ 1638, 1639.) In doing so, we find it particularly helpful to review another paragraph of the Agreement, which operates similarly to how Holly Springs insists paragraph 9 functions. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].)

Paragraph 11 addresses what occurs if Bentley exercises its option per the procedure set out in paragraph 9:

> "Escrow shall be opened with Escrow Holder within three (3) business days after Optionee deposits an executed copy of executed counterparts of this Agreement with Escrow Holder. If Escrow Holder shall require further escrow instructions, Escrow Holder shall promptly prepare such escrow instructions on its usual form for the purchase and sale of the [Option] Property in accordance herewith. Provided said further escrow instructions are consistent with this Agreement, they shall be promptly signed by Optionor and Optionee within five (5) business days after delivery thereof to each party."

Unlike paragraph 9, paragraph 11 includes the word "shall." The term "shall" typically connotes a mandatory duty. (See *Woodbury v. Brown-Dempsey*, *supra*, 108 Cal.App.4th at p. 433.) Therefore, paragraph 11 requires that escrow be opened within three days of Bentley depositing the executed Agreement with the title company. The depositing of the executed Agreement with the title company thus is the nonmandatory condition

precedent, and upon its occurrence, escrow must be opened within three days. The parties do not dispute that paragraph 11 sets out a mandatory requirement.

Paragraph 11 indicates that the drafters of the Agreement knew how to create a mandatory procedure triggered by the satisfaction of a nonmandatory condition precedent. In doing so, they used the word "shall." Paragraph 9 was not similarly written although Holly Springs contends it should function the same way as paragraph 11. Paragraph 9 discusses what Bentley may do to exercise the option, but we struggle to find any words in paragraph 9 (or the rest of the Agreement) that indicate the drafters intended the depositing of the executed Agreement with the title company to be the only method to exercise the option. If the drafters had so intended, we believe they would have more closely mirrored the language of paragraph 11.

When we read paragraph 9 with paragraph 11, we discern the drafters of the Agreement provided for a specific escrow procedure to occur if Bentley exercised the option as set forth in paragraph 9. It does not necessarily follow that the drafters were establishing the deposit of the executed Agreement with the title company was the only acceptable procedure to exercise the option. If they had so intended, in light of the language in paragraph 11, the drafters would not have used "may" to indicate a mandatory act.

Holly Springs glosses over the difference in language between paragraphs 9 and 11 and argues that Bentley's interpretation of paragraph 9 requires us to add the words "or in any other manner" after the first sentence. But in making this argument, Holly Springs ignores the fact that we would have to read certain words into paragraph 9 for it

to clearly indicate the procedure set forth in that paragraph is the only way to exercise the option. For example, the drafters could have provided: "If Bentley exercises the option, it must do so by . . ." or "The only way by which Bentley can exercise the option is to . . . ." Paragraph 9, however, does not contain any such limiting language. As such, the language of the Agreement supports Bentley's interpretation.

2. Extrinsic Evidence

"Extrinsic evidence can include the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980.) Bentley offered extrinsic evidence of David's intent in including the word "may" in paragraph 9 of the Agreement, the circumstances surrounding the negotiation of the Agreement, and the subsequent conduct of the parties. Holly Springs did not offer any extrinsic evidence to contradict the evidence offered by Bentley.

"Under California law, contracts are interpreted by an objective standard; the words of the contract control, not one party's subjective intentions." (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1634.) Thus, while Bentley offers evidence regarding actual, subjective intent, "the sufficiency of such evidence must be determined according to the usual objective standard of contract interpretation." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 351.) Here, the superior court admitted evidence of David's intent that the use of the word "may" was intended to give the parties some flexibility in exercising the option. We are mindful that such evidence is

self-serving and Holly Springs cannot easily contradict it because Sippel, the individual who negotiated the Agreement on behalf of Holly Springs, is deceased. Thus, if this was the only extrinsic evidence being offered by Bentley, we would conclude this evidence was not sufficient to allow us to interpret the Agreement absent having the fact finder weigh this evidence. However, we are aided by additional evidence.

Bentley also offers evidence that, at the time the Agreement was negotiated, there existed uncertainties about the entitlement process, the real estate market, and the potential business or personal needs of the parties. In light of this evidence, it makes sense that the parties would want to have an adaptable approach to the purchase of the Option Property. If Bentley was required to exercise the option only per the procedure in paragraph 9 of the Agreement then escrow would be opened within three days of Bentley's deposit of a copy of the executed Agreement with the title company. Thus, the transaction would be set in motion if Bentley deposited the executed Agreement per paragraph 9and the timing of escrow might not allow the parties additional time to address other business or personal concerns.

Indeed, in the record, it appears that when Bentley reaffirmed its desire to exercise the option, Holly Springs asked it to refrain from moving forward with the transaction until David talked to Doug, who was handling estate and tax issues for Holly Springs, about the structure of the purchase.

After David met with Doug on June 9, 2007, the parties communicated several times about the purchase of the Option Property. It is striking to us that at least from May 17, 2007 to late March 2008, there was absolutely no mention in the record that the

parties ever discussed exercising the option per the procedure set forth in paragraph 9 of the Agreement. This is true even though many of the discussions took place after the June 30, 2007 option term expired. The evidence strongly implies that the parties were moving forward with the purchase, but Holly Springs asked Bentley to wait on concluding the purchase because of tax and estate issues. The potential purchase was further delayed because of Sippel's death. Again, throughout this time, Holly Springs does not mention that it believed the only way for Bentley to exercise the option was by depositing the signed Agreement with the title company per paragraph 9 of the Agreement.

The uncontradicted extrinsic evidence supports the interpretation of the Agreement that paragraph 9 did not provide a mandatory procedure for exercising the option.

3. Conclusion

The Agreement is ambiguous. It is "reasonably susceptible" to the interpretation advanced by Bentley. The language of the Agreement, the circumstances surrounding the negotiation of the Agreement, and the subsequent conduct of the parties all support the interpretation that paragraph 9 was permissive. It did not provide the only method of exercising the option.

Because the extrinsic evidence offered by Bentley is not contradicted and Holly Springs does not offer any extrinsic evidence to support its desired interpretation, we may interpret the Agreement as a matter of law. (See *Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at p. 865.) As such, we are satisfied that paragraph 9 was not a

mandatory provision requiring Bentley to exercise the option only as set forth in that paragraph.

III

THE EXERCISE OF THE OPTION

The Agreement does not provide that Bentley has to exercise the option per the procedure described in paragraph 9. As such, Bentley could exercise the option by effectively communicating to Holly Springs its election to do so. (See *Lawrence v. Settle* (1960) 182 Cal.App.2d 386, 388; *Murfee v. Porter* (1950) 96 Cal.App.2d 9, 17-18.) Bentley has submitted sufficient evidence to raise a triable issue of material fact as to whether it exercised the option.

Bentley submitted evidence that, in May 2007, David informed Sippel that Bentley would exercise the option as of June 30, 2007. David reaffirmed Bentley's decision to exercise the option on May 30, 2007, but Sippel asked David to meet with her son Doug, who was handling estate and tax issues for Holly Springs, prior to moving forward with the transaction.

After David met with Doug on June 29, 2007, Bentley appeared to be moving forward with the purchase of the Option Property as Bentley obtained an appraisal. Bentley communicated with Holly Springs regarding the purchase. However, the transaction again appears to be delayed at the request of Holly Springs. Sippel was diagnosed with cancer and subsequently passed away, causing new management to be inserted for Holly Springs. This led to additional delays, and it appears from the record

that Holly Springs asked Bentley to further delay the purchase of the Option Property to allow Holly Springs to "clarify partnership, tax, and estate issues."

We are mindful, however, that Bentley sent a letter to Holly Springs dated March 12, 2008, in which it indicated that Bentley had not exercised the option. This letter is less than clear regarding the circumstances of Bentley's statement. For example, in discussing alternatives for moving forward, one of the choices presented by Bentley was: "Bentley exercises the Option immediately at the property's 'as-is' market value price." This sentence suggests that the purchase had not moved forward because there remained some disagreement regarding the price of the Option Property. Indeed, the letter indicates the parties were evaluating whether the appraisal supported "an immediate sale" or if further delay was necessary. Moreover, the March 12, 2008 letter appears to have been in response to an unproductive meeting between Holly Springs and Bentley.

In summary, we are not convinced that the March 12, 2008 letter establishes that Bentley never exercised the option. Nor does it dispel the possibility that if Bentley had not exercised the option at that time, it failed to do so at the request of Holly Springs. While the March 12, 2008 might be sufficient to ultimately convince a fact finder that Bentley never exercised the option, on a motion for summary judgment, it does not conclusively negate a material disputed fact. Especially, as here, where we must strictly construe the moving party's evidence and liberally view the opposing party's evidence. (See *Seo v. All-Makes Overhead Doors*, *supra*, 97 Cal.App.4th at pp. 1201-1202.)

Although we determine a triable issue of material fact exists as to whether Bentley exercised the option, we are aware that many of Bentley's communications occurred after

the option term expired on June 30, 2007. That said, the evidence suggests that Holly Springs's requests and actions led to the delay.

For example, after Bentley informed Holly Springs it intended to exercise the option as of June 30, 2007, Holly Springs requested that Bentley not move forward with the purchase until a Bentley representative met with Doug, who was handling estate and tax issues for Holly Springs. This meeting required the Bentley representative to travel from San Diego to Portland, Oregon. The meeting did not take place until June 29, 2007, the day before the option term was to expire. After the meeting, Bentley communicated via email with Holly Springs, discussing the exercise of the option. There is nothing in the record suggesting that Holly Springs responded that Bentley could no longer exercise the option because the option term had expired.

Indeed, Bentley and Holly Springs discussed the purchase of the Option Property over the next several months, and there is no indication in the record that the option term was discussed. Instead, Holly Springs consistently requested more time to evaluate certain financial matters.

The record therefore suggests that Holly Springs waived the option period set forth in the third amendment to the Agreement. Waiver is "the intentional relinquishment of a known right with knowledge of the facts." (*McDermott v. Superior Court* (1972) 6 Cal.3d 693, 698, fn. 3.) Further, [g]enerally the determination of . . . waiver . . . is a question of fact . . . ." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319.)

Here, the parties do not focus their respective waiver arguments on the option period, but instead, on whether Holly Springs waived the requirements of paragraph 9 of

the Agreement. Because we conclude paragraph 9 is permissive, the parties' waiver arguments are unavailing. Instead, we are satisfied that a triable issue of material fact exists as to waiver of the option term. In making this determination, we are greatly persuaded by Holly Springs's failure to invoke the expiration of the option term when it engaged in substantive discussions about Bentley's purchase of the Option Property after June 30, 2007. In fact, there is nothing in the record that indicates Holly Springs ever mentioned the expiration of the option period for almost nine months after it expired.[2]

Because we conclude triable issues of material fact exist as to whether Bentley exercised the option or Holly Springs waived the expiration of the option term, we do not reach Bentley's contentions regarding the existence of an oral modification of the Agreement or whether Holly Springs is estopped from asserting the statute of frauds.

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[2] The first indication that Holly Springs claimed Bentley failed to timely exercise the option was in a letter dated March 28, 2008. Although Bentley intended to offer this letter in support of its opposition to the motion for summary judgment, it did not include the letter in his opposition pleadings, and the court sustained Holly Springs's objection to David's declaration testimony about the contents of the March 28, 2008 letter. Apparently, Bentley tried to offer the letter at the summary judgment hearing, but there is no indication in the record that the court considered it. As such, we do not consider it in reaching our conclusion here. (See *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.)

DISPOSITION

The judgment is reversed. Bentley is awarded its costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.